IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.5705 OF 2005

Gajala Ram Jadhav ...Applicant
vs.
The State of Maharashtra & Anr. ...Respondents

WITH
CRIMINAL APPLICATION NO.5741 OF 2005

Farida Shahid Ahmed ...Applicant
vs.
The State of Maharashtra & anr. ...Respondents

Mr.J.G.Bhanushali for the Applicant in Cri.Appln.No.5705/2005
Mr.Sudeep Pasbole for the Applicant in Cri.Appln.No.5741/2005
Mr.R.Y.Mirza,A.P.P. for State
Ms Monika Sakhrani for Respondent No.2

CORAM: A.S.OKA,J.
DATE : OCTOBER 7,2005

P.C.:

1. On the last date these Applications were taken up for hearing.

2. The Applicants are accused in the pending trial before the learned Additional Sessions Judge, Greater Mumbai. The applications were made by the Applicants before the learned Sessions Judge seeking permission of the Sessions Court to allow their Advocates to visit the scene of the alleged offence. The permission was sought on the ground that it will facilitate effective cross examination of the prosecution witnesses. The said applications made by the Applicants came to be rejected by the learned Sessions Judge by order dated

16th August 2005. The prayer in the Criminal Application No.5705 of 2005 is for quashing the order dated 16th August 2005 and also for a direction to permit the defence lawyers to inspect the scene of offence i.e. Flat No.A-104, Momani Apartment, Irish Park, Behind Chandan Talkies, Juhu, Mumbai. In Criminal Application No.5741 of 2005, the prayer is made under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) seeking the same direction.

3. The Advocates appearing for the applicants submitted that according to the prosecution case the offence has been allegedly committed in the said flat. It was pointed out that the F.I.R. was lodged by the Respondent No.2 herein on 18th August 2004 stating that on 17th August 2004 at about 11.30 p.m., the Applicant in Criminal application No.5705/2005 along with her husband were present in the flat. Just after midnight, a quarrel took place between the husband of the Applicant in Criminal Application No.5705 of 2005 and the father of the Respondent No.2 and thereafter there was a fight between them. At that time one Ms Farida, Applicant in application No.5741 of 2005 i.e. the mother of the Respondent No.2 brought a revolver from bed room and fired at the husband of the Applicant in Criminal Application No.5705 of 2005. As a result of which the husband of the said Applicant received bullet injury. Further allegation is that out of anger the

Applicant in Criminal Application No.5705 of 2005 took the revolver from the hands of the said Farida and fired at Shahid Ahmed, husband of Farida who received bullet injuries. The husband of the Applicant as well as the husband of the said Farida i.e. Shahid Ahmed were declared dead after they were taken to the hospital. It is stated that the said Farida Applicant in Criminal Application No.5741 of 2005 is an accused in the companion case. Submission is that the Advocates who are representing the defence in both the cases must have an opportunity to take inspection of the flat which is the scene of offence so as to effectively cross examine the prosecution witnesses. It is pointed out that in case of the Applicant in Criminal Application no.5741 of 2005 there is an order passed by this Court while granting bail which restrains the said Applicant from entering the flat.

4. My attention has been invited to the order passed by the learned Additional Sessions Judge in which a view is expressed that there is no specific provision under the the said Code whereunder such an order can be made, but in the interests of justice it can always be made after ensuring that the interest of both the parties are protected. It is submitted that even if there is no specific power under the said Code empowering the Trial Court to pass an order, this Court can always exercise the power under Section 482 of the said Code and pass the direction.

5. The learned A.P.P. supported the impugned order by pointing out that under no provision of law such direction can be given. The learned Advocate for the Respondent No.2 in Application No.5705 of 2005 submitted that the scene of offence panchnama is on record which depicts the description of the land. She submitted that the Respondent No.2 is in possession of the flat and there is already a threat to the life of the Respondent No.2, it will not be in the interest of justice to permit the Advocates to enter the flat in question. She submitted that the Respondent No.2 has strong objection for allowing the entry to the strangers in the flat which is in her possession.

6. I have considered the submissions. The learned Sessions Judge has already held that there is no specific power under the said Code for permitting the entry of the Advocates in the said flat. However, the learned Sessions Judge held that such direction can be passed in the interests of justice. There is no dispute between the Counsel appearing for the parties that there is no specific provision empowering the Sessions Court to permit the entry of the Advocates/parties in the private property in which the offence has been allegedly committed for the purposes of allowing the Advocates to inspect the property. It must be noted here that under the provisions of the said Code and the other statutes such as the Indian

Evidence Act, 1872, there is no inherent power vesting in the Sessions Court under the said Code. The said inherent power vests only in this Court under Section 482 of the said Code. Therefore, the view expressed by the learned Sessions Judge that though there is no specific power under the said Code the direction can be issued in the interest of justice appears to be erroneous.

7. It will be necessary to refer to the provisions of Chapter XXIV of the said Code which deals with the general provisions as to enquiries and trials. Section 310 of the said Code read thus :

"310. Local inspection - (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of property appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case and if the prosecutor, a complainant or accused or any other party to the case, so desires, a copy

of the memorandum shall be furnished to him free of costs"

8. The said section empowers the learned Sessions Judge or the Magistrate to visit any place in which the offence is allegedly committed. The section makes it very clear that the said power can be exercised when in the opinion of the learned Judge it is necessary to take inspection for properly appreciating evidence which is already recorded in any enquiry or trial. There is no power under the said Code allowing the Sessions Judge or the learned Magistrate to permit anyone else to inspect the scene of offence especially when the scene of offence is in a private property. Section 310 has been already judicially interpreted. It has been held that the local inspection can take place not as a substitute for evidence. The local inspection is permitted for the the purposes of appreciating the evidence which is already recorded. The memorandum which is to be immediately recorded after local inspection is always available to the parties. Thus, even the power of the learned Trial Judge to make local inspection is restricted by section 310 of the said Code. The local inspection can be taken only after evidence is recorded and not before the recording of the evidence.

9. The scene of offence panchnama is on record. After evidence is led, in a given case the parties can always apply

at appropriate stage for invoking powers under Section 310 of the said Code.

10. Prima facie, it appears that the Respondent No.2 is in possession of the flat in question. The question is whether under the orders of the Court, entry of the persons who are strangers to the Respondent No.2 should be permitted in the flat. The question is of affecting right of privacy of an individual. If there is no express statutory provision permitting the said course to be adopted, in my view, powers under Section 482 of the said Code cannot be invoked by the Applicants. There is no error in the ultimate order passed by the learned Sessions Judge though the observations made in the said order may not be fully correct. There is no merit in the applications and the same are rejected.

11. It is made clear that the observations made in this Judgment shall not be construed as any finding or any expression of opinion on the merits of the trial.

JUDGE